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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

No. 734

CHARLES R. HARD,
*Petitioner,*

*vs.*

CIVIL AERONAUTICS BOARD,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner, Charles R. Hard, prays that a Writ of Certiorari issued to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit decided in the above-captioned case on October 8, 1957 by which that court affirmed an order entered by the Respondent suspending Petitioner's Airline Transport Pilot's Rating.

### OPINIONS BELOW.

The Initial Decision of the Civil Aeronautics Board Hearing Examiner was issued (orally) on April 28, 1956. (R. 33.) The Order of the Respondent, Civil Aeronautics Board, was issued February 6, 1957. (R. 48.) These Decisions are not officially reported. They are in the Ap-

pendix for Petitioner printed for use of the Court below, which is filed herein as the transcript of the Record and referred to as "R". This Order was stayed by the Respondent Board on February 19, 1957. This Order was stayed by the Court of Appeals below pending determination for review by that Court on March 11, 1957. The judgment of the Court of Appeals was entered October 8, 1957. The opinion is at 248 F. 2d 761 and appended hereto (*infra* p. 25). The execution and a stay of mandate of the judgment was stayed pending review on certiorari by Justice Clark December 17, 1957.

## JURISDICTION.

The judgment of the Court of Appeals was entered October 8, 1957 and is included in the record as transmitted to this Court. The basis of jurisdiction in the court below was Section 1006, Civil Aeronautics Act of 1938, 52 Stat. 973, 980; 49 U. S. C. A. 646. This Petition for a Writ of Certiorari is filed within the time prescribed in 28 U. S. C. Section 2101(c) as further extended to January 21, 1958 by order of this court dated December 20, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 49 U. S. C. 646(f).

## QUESTIONS PRESENTED.

In a proceeding under Section 609 of the Civil Aeronautics Act of 1938 as amended, 52 Stat. 1011, 49 U. S. C. Sec. 559 (referred to herein as the Act), Respondent, Civil Aeronautics Board, issued an order suspending Petitioner's Airline Transport Pilot Rating Certificate for a period of six (6) months (allowing credit for the sixty (60) days which had already been served as a result of an earlier "emergency" suspension). There was no finding, nor was it contended, that Petitioner was in any way unqualified to

hold such rating. The six (6) months suspension having been ordered because the Respondent Board determined that disciplinary action was called for and the sanction was imposed to provide a sufficient deterrent against Petitioner and other pilots from violating Civil Air Regulations. The Court of Appeals affirmed the Respondent Board's order.

The questions presented are (1) whether under Section 609 of the Civil Aeronautics Act of 1938, Congress intended to empower the Board to suspend the airman certificate of a qualified pilot purely as a deterrent sanction for penal purposes, and (2) whether a long standing practice and custom of the Board is sufficient to justify the exercise of such penalty power under Section 609 of the Act, particularly when the Respondent Board had earlier issued its Accident Investigation Report on the same incident upon which the penalty is based, and (3) whether the Board can, under Section 609 of the Act, entertain an appeal couched in remedial terms when the pilot has been examined and found qualified and then after the Board has already considered the record of an *ex parte* proceeding based upon the same incident of the appeal, but without due process safeguards, enter a penal sanction which punishment exceeds in time loss the $1,000 per violation limit of Section 901 of the Act.

## STATUTES AND REGULATIONS.

The pertinent provisions of the Civil Aeronautics Act of 1938 are Sections 2, 201(b), 301, 401(h), 601(b), 609, 901 and 903(b), together with Civil Air Regulations Sections 21.16, 21.24(d), 21.41, 21.42, 60.12, 40.301, 40.302; Part 301.1, 303.2, 303.13, 303.14, 303.22, all of which are set out in the Appendix hereto, so far as material here.

## STATEMENT OF THE CASE.

On February 7, 1956 Petitioner Charles R. Hard, while captain-in-command of Eastern Air Lines Trip 156, a Martin 404 type passenger aircraft, engaged in air commerce between Evansville, Indiana and Owensboro, Kentucky was involved in a landing accident at Owensboro seriously damaging the aircraft but causing no personal injuries. He was immediately removed from flight status by his employer Eastern Air Lines and was subsequently physically examined and otherwise checked by them. On March 3 and March 4 Petitioner Hard passed the authorized proficiency examinations given by Eastern Air Lines Check Pilot W. B. Poe and Civil Aeronautics Administration Safety Agent Wm. E. Feast. Hard was then returned to flight status and on March 7 commanded a regularly scheduled Eastern Air Line trip to Charlotte, North Carolina from Chicago, Illinois. On March 8 the Administrator of Aeronautics (referred to herein as the Administrator, see Section 201(b) and 301 of the Act) alleging authority under the emergency clause of Section 609 of the Act, suspended Petitioner's Air Line Pilot Transport Rating (referred to herein and in the decision below as an A.T.R.) for thirty (30) days (thereafter renewing for an additional thirty (30) days) on the grounds (although Petitioner was not informed of these grounds until the 13th) that the Owensboro incident disclosed facts which revealed Petitioner lacked competency and judgment necessary of a holder of an A.T.R. On March 16, the Administrator alleging jurisdiction under Section 609 of the Act filed a Complaint[1] with the Civil Aeronautics Board requesting that Petitioner's A.T.R. be revoked or suspended for lack of qualification.

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1. The Act does not empower the Administrator to so file, but this has been the practice in most of these proceedings. (14 C. F. R. 301.1.)

Meanwhile, on March 22 and 23, the Board through its Bureau of Safety Investigation held an inquiry and public hearings regarding the Owensboro accident and took sworn testimony of the Petitioner and twenty-two other witnesses pursuant to statutory authority Section 702(a) of the Act. (Reorg. Plan No. IV 1940 52 Stat. 1012, 49 U. S. C. A. 581, 582, *infra* p. 35).

A Motion to Dismiss the Administrator's Complaint was filed on the grounds that the Administrator had misconceived his action and was seeking the suspension or revocation as a penalty and not for remedial purposes as the Petitioner was tested, fully examined by the Administrator and had successfully demonstrated that he did lack qualification to retain his A.T.R. This Motion was denied by a Board Hearing Examiner on the grounds that it constituted a defense. The Petitioner's Motion to Certify this question to the Board was denied and on April 26, the Examiner held a hearing on the merits. The Examiner concluded that the "emergency" suspension was in the public interest but found no violation of any rule, regulation, or statute and that the "emergency" suspension be terminated effective May 7 (the date which the second suspension period would have expired in any event). Petitioner again resumed his status as an airline pilot with Eastern Air Lines. The Administrator appealed[2] the Examiner's decision to the Board requesting that Respondent Hard's A.T.R. be revoked because of lack of qualification. The Petitioner herein opposed this appeal and requested that the Initial Decision of the Examiner be sustained and his findings with a single factual exception and conclusions be adopted. On July 10 the Civil Aeronautics Board released its Acci-

2. The Act does not empower the Administrator to appeal. This has also been a practice of the Board, but see *Lee* v. *C. A. B.*, 225 F. 950 (C. A. D. C. 1955) which held that the Administrator lacked standing to petition the Court of Appeals for review of a Board order.

dent Investigation Report on the March 22, 23 hearings and inquiry finding that the "*probable cause*" of the accident was due to an improper landing approach by the Petitioner. On February 6, 1957 the Civil Aeronautics Board issued the order herein reversing the Examiner finding Hard guilty of violating Civil Air Regulation 60.12 (App. p. 39) and suspending Petitioner's A.T.R. for six months but allowing credit for sixty (60) days which he had already been suspended as a result of the emergency action. This suspension was because the Board determined that disciplinary action was called for and the Board must impose a sanction by a substantial suspension of Hard's rating to provide a sufficient deterrent against Hard and other pilots from taking similar risks.

## INTRODUCTION.*

This is a case of first impression and this petition is sought because the issues presented have a significant impact upon air commerce as well as raising important questions of administrative law.

The issue here is solely a question of statutory construction. The facts of this incident that were tried before the Respondent Civil Aeronautics Board were uncontested on appeal so that full emphasis and consideration could be given to the jurisdictional question which has significance to all holders of Civil Aeronautics Administration issued certificates.

The court below in a dramatic effort to avoid the clear punitive nature of the order herein has needlessly introduced a new concept of suspensions which it considered necessary for the protection of an undefined "gray zone". (Op. below, *infra* p. 28.) In so doing, it has missed the historic importance of a properly conducted flight examination, overlooked the congressional mandate resting the prime responsibility for the highest possible degree of air safety upon the air carriers, and failed to recognize that a suspension order for deterrent purposes has been declared punitive, not only by the courts but by the Respondent Board itself.

We are aware of neither statute nor case authority which condones punitive power in an administrative agency unless the language of the endowing statute expressly authorizes it, a fact that is emphasized by the scarcity of cited cases in the decision below and its related case, *Wilson* v. *Civil Aeronautics Board*, 244 F. 2d 773 (C. A. D. C., 1957) Cert. denied 78 S. Ct. 119, November 12, 1957, which termed a Board suspension order a "disciplinary action."

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* All italics herein are the author's unless otherwise indicated.

## REASONS RELIED UPON FOR THE WRIT OF CERTIORARI.

### I.

**THE COURT OF APPEALS BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.**

**A. The Suspension Order Is Penal.**

Neither the Civil Aeronautics Board Hearing Examiner nor the Respondent itself found Petitioner unqualified in any respect nor considered grounding him as necessary in order to protect the public. The Board by "making an example of Hard in order to deter him and other air line pilots from jeopardizing the safety of travelers by air" (Op. below, *infra* p. 27) concluded that a six-month disciplinary suspension was necessary. The phrases "sufficient deterrent," "disciplinary action," "sanction" and "ultimate sanction," were employed by the Board to describe its action. (R. 64.) The cases are clear that an order with this purpose renders the action penal. *Cummings* v. *Missouri*, 4 Wall. 277, 322; *Huntington* v. *Attrill*, 146 U. S. 657, 668; *Helwig* v. *U. S.*, 188 U. S. 605, 611; *Porter* v. *Montgomery*, 163 F. 2d 211, 215 (C. A. 3); *Heitmuller* v. *Berkow*, 165 F. 2d 961, 963, 964 (C. A. D. C.); *Lee* v. *C. A. B.*, 225 F. 2d 950, 953, in which Judge Prettyman, in discussing a complaint similar to the one herein, observed that "Any reading of the complaint shows the action prayed is purely punitive." In this respect the complaints in the two cases are identical.

**B. Penal Powers Cannot Be Implied.**

It has long been held that a punitive power cannot be implied from general remedial terms of a statute. *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, 410; *U. S.* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571, 575, 576; *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, 362, 373; *Campbell* v. *Galeno*, 281 U. S. 599; *Wallace* v. *Cutten*, 298 U. S. 229, 237.

**1. Administrative Practice.**

The Respondent Board urged below (Op. below, *infra* p. 31) that an administrative practice whereby it had "suspended more than 4,000 airmen for violations of rules and without finding that they lacked competence or qualification to fly"[1] should have great weight in statutory interpretation.

Although the precise rule as to the effect of "long" continued administrative practice is something less than clear (see 73 L. Ed. 322; 84 L. Ed. 28), it is certain that to be given any effect at all it must have been a ruling which can reasonably be held to have decided the point in issue. *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39; *Anderson* v. *McKay*, 211 F. 2d 798, 805 (C. A. D. C.); *Order of Railway Conductors* v. *Swan*, 152 F. 2d 325, 329 aff'd. 329 U. S. 520; *F. W.*

1. Incidentally, we have been unable to locate this plethora of 4000 cases. The printed reports of the Board (5 and 13 C. A. B. Reports) do not remotely approach this figure. Inasmuch as the Respondent Board has this information peculiarly within its own knowledge, we suggest it would be helpful to know in how many of these cases the violating pilots were represented by counsel and how many involved an airline transport pilot rating of a scheduled airline pilot (where certainly the public interest must loom considerably higher than a student flying after school from a neighboring filling lot), in how many the issue of penal jurisdiction was raised and argued to the Board and in how many the suspension order caused a loss in excess of $1000 per violation.

*Woolworth Company* v. *United States*, 91 F. 2d 973, 976. It was not until very recently that the Respondent Board *for the first time* specifically held that a complaint alleging that the pilot "had operated the aircraft in a careless manner so as to endanger the life and property of others" in violation of certain Civil Air Regulations (14 C. F. R. 60.12 *infra* p. 39) was punitive, stating:

> "We are inclined to the view, and hold, that suspensions imposed *merely to prevent and deter* violations, and where *requalification* in one or more respects is not involved *are punitive* in the constitutional sense, and are a type of '*penalty*' from which immunity is provided by Section 1004(i)." Brubaker and Olsen, CAB Dockets SR-2168, 2169, August 2, 1954.

Recently, this Court in *United States* v. *E. I. DuPont de Nemours and Co.*, 353 U. S. 586, 590, rejected an argument that a 35-year administrative practice by the Federal Trade Commission would be persuasive as to the intent of Congress observing that as the question was being decided by it *for the first time* the Court had the duty to reconcile administrative interpretations with policies laid down by Congress.

If the interpretation of the statute does not impose the results of any specialized departmental knowledge or experience, administrative practice will not be preserved upon the courts. *Hagger Co.* v. *Helvering*, 308 U. S. 389, 398; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369.

We conclude, therefore, that penal power cannot be created by Respondent's administrative practice.

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**2. The Public Interest.**

Nor can punishment authority be implied under the "public interest" provision of the Act for in *American Airlines* v. *North American*, 351 U. S. 79, this Court in

treating with the phrase "the interest of the public" under Section 411 (49 U. S. C. 491) of the Act stated at 85:

> "*The Section is not concerned with punishment of wrongdoing* or protection of injured competitors but rather with protection of the *public interest.*" (Italics supplied.)

To the same effect is *United Air Lines* v. *C. A. B.*, 198 F. 2d 100, 105 (C. A. 7).

**3. Administrative Discretion.**

The penal power can hardly stem from what is often termed an administrative agency's broad discretionary powers. We are aware of no authority which gives a government administrative official discretionary power to penalize without specifically so stating in the enabling statute.[1] In any event, the exercise of discretionary authority does not permit errors of law. *McGrath* v. *Kristensen*, 340 U. S. 162.

**4. Specific Remedial Finding Is, in any event, Necessary.**

We submit that such error of law exists for in *L. P. Steuart & Bro.* v. *Bowles*, 322 U. S. 398, this Court held that such penal power will not be implied stating at 404:

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. (Citing cases.) Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could

1. Note that the draftsmen of the Act granted discretionary power by the simple expedient of so stating, e. g. Sec. 602(b) of the Act, "Provided, That the Authority (Board) may, *in its discretion*, prohibit or restrict the issuance of airman certificates to aliens, or may make such issuance dependent on the terms of reciprocal agreements entered into with foreign governments."

be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record."

The Court did sustain the suspension order, which prevented an oil distributor from obtaining his share of wartime rationed oil, *upon the specific remedial finding* that it furthered the equitable allocation of oil as required by the statute.

We suggest that the court below in making the statement (Op. below, *infra* p. 28.) "* * * (W)hether the Board's order has salutary effect is beside the mark for all the agency can do is strive for protection of the public travelling by aircraft" overlooks the *air carrier's* prime responsibility in the safety field (Section 2b, Section 601b of the Act), and ignores requirement of *Steuart, supra,* as well as the philosophy underlying administrative agencies, that the expert body must *make a specific finding* demonstrating that its order is remedial and in fact regulates "air commerce in such manner as to best promote its development." (Section 2(e) of the Act.)

Capt. Hard is a senior airline pilot, 44, who two years ago, had over 10,000 hours or some 185,000 miles including about 1,443 instrument hours in the air without incident or reprimand of any sort whatsoever.

It may well be considered that "making an example of Hard" by levelling a "substantial suspension" because he "took a risk" with not only his own life but with those of fellow "crew members" and "his passengers" might have an effect on his brother pilots other than deterrence. For it is these men who are asked every hour of the day and in every corner of the globe to shoulder public safety in an air age rapidly becoming ever more complex[1] with faster and more powerful planes flown through congested

1. See comments of the Director of the Board's Bureau of Safety in 22 F. R. 9079 (Nov. 14, 1957).

airways and on to airports that were built at a time when today's norm would have been considered boldly experimental. Safety is with these men. This is hardly the time to cultivate a blind spot to administrative optics for that will only result in a *carte blanche* authority to hinge all blame and sanction upon the individual air man. Salutary effect is not beside the mark. It is the basic issue.

The suspension order cannot be termed non-penal by concluding that a "substantial suspension" for deterrent purposes will best protect the public, when there is a similar, if not, greater deterrence in a civil penalty imposed after a judicial hearing with the right to a trial by jury as contemplated by Sections 901 and 903 of the Act. (*Cf.* 401(h) of the Act.) Deterrence cannot be the jurisdictional divider. For in a deterrence sanction the remedial effects, if any,[1] flow from the imposition of the punishment (*Helwig* v. *U. S.*, 188 U. S. 605, 611) whereas punishment involved in a truly remedial order (*i. e.*, one which is used to correct an existing deficiency) is purely incidental. This long standing distinction has been overlooked by the court below.

Moreover, the grounding of an experienced airman for any period whatsoever will tend to make him less qualified—at least temporarily for flying in scheduled air commerce is a profession whose skills must be constantly exercised in order to maintain the highest degree of skill possible. This fact is well recognized by the Board in its own regulations which in several instances require *recent* flying experience in order to obtain and maintain an airline transport pilot rating. (14 C. F. R. 21.16, 21.41, 21.42, 40.301, 40.302, *infra* pp. 37, 38.) These are, of course, very minimum requirements; the air carriers are free to increase them and often do. In fact the Respondent has recently inaugurated hearings to increase this amount. See 22 Federal Register 9079 (Nov. 14, 1957.)

1. We assume *arguendo* that such deterrence is necessary in order to require pilots to fly safely.

The Board's order herein (R. 65) provided for an appropriate flight check to be given by the Administrator after the serving of the suspension penalty. Under the regulations (14 C. F. R. 40.302(b)) Petitioner would normally be due for such check anyhow, but this inclusion by the Board is significant for it emphasizes the necessity of recent flying time in order to maintain proficiency. The fairness is something else again, after a substantial lay off a pilot might well have difficulty regaining his touch. Furthermore, to ground an experienced pilot not only renders him less qualified but necessarily means a less experienced pilot must take his place. Highly trained pilots are presently in short supply[2] and this at a stage in which air commerce is constantly expanding.

The significance of all this is simply that in this heedless expediency to usurp penal power for the Board, air commerce is being hindered rather than developed. It is, therefore, of special importance that this court accept this case in order to correct the Board's statutory deviation.

### C. If a Penal Power Is Implied It Runs Afoul of Due Process.

Consideration by tribunal of information which has not been formally introduced as evidence and subject to cross-examination and particularly an *ex parte* and informal exploration by those in charge, deprives the accused of due process. *I. C. C.* v. *Louisville & Nashville Ry. Co.*, 227 U. S. 88; *Kwock Jan Fat* v. *White*, 253 U. S. 455; *U. S.* v. *Abilene Ry.*, 265 U. S. 294; *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S. 294; *Reilly* v. *Pinkus*, 338 U. S. 269, 275; *Re Aughenbaugh*, 125 F. 2d 887 (C. A. 3); *Alexiou* v. *McGrath* (D. C. D. C.), 101 F. Supp. 421.

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2. See Clark "Airlines Face First Major Pilot Shortage" Aviation Week Jan. 16, 1956. "The Airlines Flight from Reality," Fortune Magazine Feb. 1956 p. 91.

In *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, this Court held that the Petitioner's allegation of prejudgment by the Board of Immigration Appeals—a Board subordinate to the Attorney General—because of the latter's public distribution of a list announcing his intention to deport certain "unsavory characters", including Accardi, would require an independent hearing in the District Court on such issue. Justice Clark stated at 268:

> "If petitioner can prove the allegation he should receive a new hearing before the Board without the burden of the previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and, in arriving at its decision, exercise its own independent discretion, after a fair hearing, which is nothing more than what the Regulations accord the petitioner as a right."

On May 22 and 23, 1956, the Respondent Board, pursuant to its statutory authority[1] conducted public hearings before a Civil Aeronautics Board Hearing Officer, Thomas K. McDill and a panel of two other Board Officials in a proceeding entitled "*In the Matter of: An Accident Involving an Aircraft of U. S. Registry N445A, Eastern Airlines, Inc., Martin 404, which occurred at Owensboro, Kentucky on February 17, 1956.*" Some twenty-three witnesses, including Petitioner, were examined under oath. The normal rules of evidence such as objections and the right to cross-examine are not part of this procedure. (See 14 C. F. R. 303.10, 303.13, 303.14, *infra* p. 39 and note that Sections 4, 5, 7, 8 and 10 of the Administrative Procedures Act are expressly inapplicable.)

On July 5, 1956, the Respondent Board adopted the "Ac-

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1. The Board has a statutory duty to "Investigate such accidents and report the facts, conditions and circumstances relating to each accident and the probable cause thereof." (Reorg. Plan No. IV 52 Stat. 1012 1940, Section 702(a) (2), Civil Aeronautics Act 49 U. S. C. A. 581, 582(a).) *infra* p. 35.

cident Investigation Report" which determined the *"probable cause"* of the Owensboro accident:

> "The Board determines that the probable cause of this accident was an improperly executed final approach, (by the pilot) resulting in a stall, during a steep, left turn at an altitude too low to permit recovery."

This report was publicly released on July 12, 1956, while the Initial Decision herein of Board Hearing Examiner, H. G. Moorhead, which imposed no sanction and found no violations on the part of Petitioner Hard, was pending upon appeal and a decision was being awaited by the Board. The finding was never recalled, cancelled, or overruled and, therefore, remained as a Board precedent. And the precedent resulting from the *ex parte* proceeding of the Accident Investigation Inquiry controlled—for the Board's final order on the appeal was adverse to Petitioner to the tune of a six month suspension.

This is a serious penalty action which can deprive the pilot of his professional rank for a time, if not forever.[1] If fair administration of justice requires an opportunity for the accused in a penalty proceeding to have his rights determined by a tribunal which had not already made up its mind based upon information dehors the record and not obtained through due process channels, then we should be able to safely assume that the Board's penalty procedure would not receive this Court's blessing. Due process demands more. *Cf. Bridges* v. *Wixon*, 326 U. S. 135, 154. And see *Lockwood* v. *District of Columbia*, 24 App. D. C. 569 (1905), to the effect that statutes imposing restrictions upon occupations are to be construed strictly. *Cf. Dent* v. *W. Virginia*, 129 U. S. 114; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, fn. 5, p. 239.

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1. There is no limit to the sanctions possible under Section 609, a fact that is embraced by 14 C. F. R. 21-24(d) (*infra* p. 37) which authorizes revocation as legitimate sanction.

Even had Congress specifically authorized this undertaking, it would run contrary to the holding of *Accardi* v. *Shaughnessy*, 347 U. S. 260, *supra*; for this Court remanded that case to the District Court for an independent hearing on the allegation of pre-judgment. Now the obstacles in proving pre-judgment by the Respondent Board are really insurmountable and the entanglement becomes apparent when we realize there is no appropriate forum to independently determine this issue. A proper hearing would of necessity require examination under oath of the members of the Board who issued the order. (*Shaughnessy* v. *Accardi*, 349 U. S. 280, 283.) This could hardly be accomplished before the Board itself.

*Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683 (Op. below *infra* p. 32) does not adequately offset this claim of prejudgment as that case was not a penalty proceeding. And in contrast to the *Cement* case, congressional purpose here would be fulfilled by reversing the decision below as Congress placed the remedial, investigative and economic functions in the Board and avoided any possible infractions of due process by specifically providing that penalties for violations be processed in the District Courts (Section 901, 903 of the Act.)

The decision below has special and important impact on every airline pilot in the country for he is now in a quandary as to whether he is in jeopardy of having the C. A. B. Accident Investigation Hearing[1] ultimately influencing the Board to prejudge his case before it can hear any penalty proceeding. It is Petitioner's position that this is precisely what happened in this case.

Further, as a practical result of the decision below, any holder of a certificate issued by the Civil Aeronautics

1. The pilots themselves are, of course, desirous of having *all* facts brought forth, that might prevent recurrence of an accident or incident and are, therefore, prone to cooperate to the fullest extent.

Administration becomes dependent upon the whim of the Administrator for a statutory right to a trial by jury. The certificate holder has been afforded a statutory right to a jury trial, which is no longer his to demand. Naturally, any seeming curtailment of a right to a jury trial should be severely scrutinized. *Dimick* v. *Schiedt*, 293 U. S. 474; *District of Columbia* v. *Colts*, 282 U. S. 63. It should be noted here that when civil penalties are sought by the Administrator under Section 901, they stem from the same type of alleged violation incidents that are tried before the Board. There is no discernible rule, reason or standard—written or otherwise—which is determinative of whether a penalty complaint for violation of Civil Air Regulations is processed at home with the Board or in the appropriate District Court. As to any particular would-be violator, then, the jurisdictional classification affirmed below is unreasonable and arbitrary in depriving a jury trial in a violation proceeding. We submit that this fact alone should warrant consideration of this case by this Court.

**D. Analogous Statutes Rebut the Assumption of Penal Power.**

It is appropriate to examine other statutes in related fields of Government activity in order to dispel any doubts as to legislative intention and construction. See *Boston Sand Company* v. *U. S.*, 278 U. S. 41; *United States* v. *C. I. O.*, 335 U. S. 106.

The most analogous law is that regulating the Merchant Marine and it will be noted that the language empowering the Coast Guard Commandant to suspend or revoke certificates for violations is unequivocally clear. It states that if the Commandant of the Coast Guard shall find that a certificate holder is "incompetent or has been guilty of misbehavior, negligence or unskillfulness, or has

endangered a life, or has willfully violated any of the provisions of title 52 of the Revised Statutes or any of the regulations issued thereunder, * * * he shall suspend or revoke the license * * * of such officer or holder of such certificate * * *" R. S. 4450; March 3, 1911, c. 231, or Sec. 291, 36 Stat. 1167, as amended May 27, 1936, 49 Stat. 1381; 46 U. S. C. A. 239 (g).

The section pertaining to sea captains, who certainly are akin to airline captains, reads:

> "Licenses of captains * * * such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, incapacity, inattention to his duties, or the willful violation of any provision of this chapter * * * applicable to him." 46 U. S. C. A. 226.

Likewise, the Communications Act of 1934 empowers the Federal Communications Commission to affirm, modify, suspend, or revoke certificates in issue after notice of hearing and the statute specifically enumerates a detailed description of violations such as "violating any Act, treaty or conviction, * * * willfully damaging radio apparatus, transmitting false or deceptive signals, * * * etc." 47 U. S. C. A. 303(m). See also, the Securities Exchange Act of 1934, 15 U. S. C. 78s, 48 Stat. 898, and the Interstate Commerce Act, Part II, Sec. 212, 49 U. S. C. A. 312, 49 Stat. 555, which specifically allow suspension where a licensee has willfully failed to comply with the Act or regulations.

Incidentally, the principle of construing penal statutes strictly has also been overlooked by the Court below. *Campbell* v. *Galeno*, 281 U. S. 599; *Bulger* v. *Benson*, 262 Fed. 929 (C. A. 9, 1920). The latter case, involving marine pilots, is identical on principle with this one and not unnaturally provokes the thought that flying is to be treated as a special phenomenon best avoided.

## II.

## THE DECISION OF THE COURT OF APPEALS BELOW AS RENDERED IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE SAME MATTER.

The court below resorted to a rather unusual device in rejecting Petitioner's contention that the order herein was purely punitive stating (*infra* p. 28): "What Hard contends for would drive the Board into an area of sharp black and white, leaving the gray zone unprotected when, in the exercise of its discretion, a qualified airline pilot's behavior merits suspension rather than revocation of rating." This "gray zone" introduces a third concept into what formerly was a simple remedial-penal dichotomy of suspension orders properly divisible and adequately protecting the public with the use of an authorized examination. This new conception which ignores the effect and importance of such duly authorized examination has wider implications than may appear at first blush.

First, it creates a conflict within the circuits, for here Petitioner Hard was given a flight examination by his Company (Eastern Air Lines) Check Pilot and by the Civil Aeronautics Administration Safety Agent, William E. Feast, and found qualified in all respects including judgment. (R. 24-25.)

*Brown* v. *Civil Aeronautics Authority*, 112 F. 2nd 737 Op. Suppl. 119 F. 2d 172 involved an order by the Civil Aeronautics Authority (the title by which the Board was then known) which suspended Brown's pilot certificate for sixty days "and thereafter until he shall have demonstrated through a written examination that he is thoroughly familiar with the pertinent Civil Air Regulations and local traffic rules." The Authority had earlier found that Pilot Brown had violated certain traffic regulations, and misused an experimental aircraft and that these violations rendered him a potential hazard to the flying public. *Brown, Airman Certif.*, 1 CAB 666, 669.

The Ninth Circuit denied Petitioner's request for a supersedeas without prejudice, until after the Petitioner had offered to take the required examination or, unless the Authority declined to examine Petitioner within five days, stating at 112 F. 2d 737 "*if the suspension for sixty days was purely punitive* the application might be granted but the order also requires a written examination to ascertain whether or not Petitioner should be allowed to fly at all. We cannot make an order to jeopardize the safety of the public. For that reason, it is clear that the Petitioner shall *take the proposed examination before his right to fly is restored.*" Petitioner then took and passed the required examinations and his renewed petition for supersedeas was granted. (*Brown* v. *C. A. A.*, 119 F. 2d 172, 173.)

Although the case then became moot, it is clear authority for the proposition that once pilots' qualifications to fly had been determined by a duly conducted examination then the suspension order was "purely punitive". The cases are in clear conflict on this crucial issue.

Second, the holding below has special and important significance to all holders of Civil Aeronautic Administration issued airmen certificates inasmuch as apparently the regular examination given by the government Safety Agents and the air carrier check pilots is no longer sufficient to determine whether or not they are qualified to fly. If, as the decision below states, this is a "gray zone" then several thousand of pilots flying in air commerce who take periodic examinations, now have a judicially imposed legal doubt as to whether they are actually qualified to fly or whether they are in the midst of this strange undefined "gray zone". If these examinations cannot determine their designed purpose, then there is little gain and much time and money lost by requiring them.

Third, of even greater concern, to each certificate holder, is the open invitation to administrative mischief. There

is no explicit penalty criterion in 609 (presumably there must be a relationship to aeronautics, but aeronautical certificates should present no obstacle here) and if the examination has no meaningful effect than the authorities are free to suspend or revoke, without regard to demonstrated qualification and without the hindrance of a defined limitation (*e. g.* Section 901 has a limitation of $1,000 for each violation). In other words, the sky is the limit. See *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 240-43. And, as illustrated by this case, the use of the emergency suspension power (R. 23, 29) can be summarily utilized without the benefit of a bill of particulars. It is difficult to perceive how this promotes, or develops air commerce as conceived by the framers of Section 2 of the Act. Nor can this be said to encourage new airmen to come into this field especially at this time when experienced pilots are in acute supply.

## III.

**THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.**

Section 903(b) of the Act (49 U. S. C. A. 623(b)(1)) details the procedure in respect to civil penalties for violation of Title VI (the authority for promulgating Civil Air Regulations). Paragraph (4) of that Section states:

> "(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law."

Reported cases of these decisions are rare and, so far as we are aware, this Court has never had occasion to prescribe, or direct other courts to prescribe, such rules not otherwise provided by law.

The present atrophic condition of Sections 901 and 903 is a result of administrative legislation and is inconsistent with the substantial body of law that must have been anticipated by the Congress[1] in order to have induced it to provide this important provision. A glance at Titles V, VI and VII (the only parts of the Act subject to the civil penalties of Section 901) will demonstrate that this congressional foresight could be predicated only upon anticipated judicial proceedings involving penalties for violations of the regulations promulgated under Title VI.

This premise considered, it is respectfully urged that it is of importance to the segment of the public involved in interstate and foreign air commerce that this Court consider this case to determine in what cases the holders of certificates issued by the Civil Aeronautics Administration are entitled to judicial process and a trial by jury.

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1. See speech by Senator McCarran, 83 Cong. Rec. 6634 (May 9, 1938).

## CONCLUSION.

That the order herein is primarily penal there can be no doubt; proper perspective will manifest the clear fact that Congress never intended the Respondent Board to have punitive powers. And for good reason, as illustrated by this case, such power not only deprives the accused airman of due process but frustrates and hinders the development of air commerce as contemplated by the Civil Aeronautics Act of 1938.

This case, then, has significance to all Civil Aeronautics Administration Certificate-holders and to air commerce in general. It is submitted, therefore, that the Writ of Certiorari should be granted.

Respectfully submitted,

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